

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 MIAMI DIVISION

4 Case 02-20473-CR-CMA

5 THE UNITED STATES OF AMERICA,

6 Plaintiff,

7 VS.

8 MIAMI, FLORIDA

9 BRUCE COWEN,

10 JUNE 14, 2005

11 Defendants.

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TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE THE HONORABLE CECILIA M. ALTONAGA,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

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United States Department of Justice
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1 THE COURT: Good morning.

2 MR. HANUSIK: Good morning, Your Honor.

3 THE COURT: Everyone please be seated.

4 In the matter of United States versus Bruce Cowen,
5 could I have appearances for the record?

6 MR. HANUSIK: Thank you, Your Honor. Tom Hanusik, for
7 the United States.

8 MR. AARON: Good morning, Your Honor. William Aaron,
9 local counsel for Mr. Cowen.

10 Also present is Carlos Negrete, counsel for Mr. Cowen,
11 and I would like to take this opportunity to introduce to the
12 Court Alan Ellis.

13 Mr. Ellis is a nationally recognized authority in
14 sentencing and Sentencing Guidelines. He is a lecturer in
15 criminal law education programs for attorneys. He has been an
16 author of many, many articles, including most recently for the
17 ABA, "Litigating in the Post-Booker World."

18 Mr. Ellis is here from California and Pennsylvania
19 where his office is.

20 THE COURT: Good morning.

21 MR. ELLIS: Good morning.

22 THE COURT: Welcome.

23 From Probation?

24 THE PROBATION OFFICER: Debra Speas, Your Honor.

25 THE COURT: We're here for Mr. Cowen's sentencing

1 hearing. Let me hear first from Mr. Hanusik.

2 MR. HANUSIK: Thank you, Your Honor.

3 I have filed yesterday a motion for downward
4 departure, as well as a response to the defendant's sentencing
5 memo.

6 I will, at this point, only address the motion for
7 downward departure since I don't have anything to respond to
8 until I hear from them.

9 Let me, for Barbara's benefit, move closer to the
10 mike.

11 The motion, I think, sets forth the basis for the
12 downward departure. The Court itself has, obviously, observed
13 Mr. Cowen on, I guess, four separate occasions during two
14 trials where he testified at length as part of his cooperation
15 with the Government.

16 Mr. Cowen was not the first person to plead guilty in
17 this case, but he was the second person to come in. He did
18 come in pretrial. He came in timely, in other words.

19 He has had 15 or so meetings with the Government.
20 These have included extensive debriefings, document review,
21 standard data downloads from him to us. There have been
22 numerous telephone conferences as well.

23 I would say, for the record, Mr. Cowen has always
24 shown up prepared to assist the Government. He has shown up
25 ready and willing and able to lend his efforts, his insights to

1 provide all information at his disposal for the benefit of the
2 Government and to substantially assist the Government in its
3 ongoing prosecutions in the case of Mr. Kelly and the ongoing
4 investigation, which is really not a matter of public record,
5 but there is an ongoing criminal investigation he has
6 participated in, substantially assisted the Government in.

7 He was always willing to testify. He has expended his
8 own funds to fly across the country to meet with the Government
9 on numerous occasions. I saw an affidavit in which I believe
10 he said he spent more than \$10,000. I have no reason to doubt
11 that was the amount. I am sure it is.

12 There were a significant number of meetings where he
13 did come to Miami and Washington, D.C. for the convenience of
14 this prosecutor.

15 He has substantially assisted the Government by
16 testifying at two different trials. He has helped through
17 ongoing cooperation in an existing investigation which includes
18 a parallel investigation for the SEC. I realize that's a civil
19 investigation, but it's a parallel investigation, so we think
20 mention of that is warranted in this case.

21 The result is that we have recommended a 40 percent
22 departure from whatever the Judge now believes under the new
23 regime of advisory Guidelines would be a reasonable sentence.
24 We think that's an appropriate reflection of the assistance
25 that he has provided and also a reflection of the fact that his

1 plea alone already provides a benefit of five years versus the
2 original Guideline calculation of 87 months.

3 THE COURT: Thank you, Mr. Hanusik.

4 I'll hear from defense counsel.

5 MR. ELLIS: May it please the Court.

6 Before starting, I would like to, if I may, take the
7 opportunity to indicate several members of Mr. Cowen's family
8 are in the court today and if, with the Court's permission, I
9 would just ask them to stand up.

10 THE COURT: Certainly.

11 MR. ELLIS: Thank you.

12 Your Honor, responding to the Government's 5K1.1
13 motion, I have no quarrel with the motion itself. The only
14 thing I would point out to the Court, and it's pointed out in
15 our sentencing memorandum at page 29, that the Guideline range
16 in this case is 60 months. It's not 87 to 108, and that's
17 clear under USSG § 5G1.1, which says where the maximum sentence
18 is lower than the otherwise Guideline range, the Guideline
19 range is the maximum sentence, which in this case is 60 months,
20 and the Rodriguez case, cited on page 29, indicates that the,
21 any downward departure should come from the 60 months and not
22 the otherwise, the other range.

23 To that end, we received the Government's sentencing
24 memo yesterday and I just would like, if I may, to respond to a
25 couple of points that my learned brother at the bar,

1 Mr. Hanusik, has made, I think, if I may.

2 THE COURT: Certainly.

3 MR. ELLIS: Again, Mr. Hanusik, on page 3, indicates
4 that the resulting Guideline range is 87 to 108. I have
5 addressed that. It's 60.

6 Also on page 3 -- parenthetically, I must say
7 that -- Mr. Negrete and I were talking about this -- in
8 California one of the local rules is that all pleadings have to
9 be on numbered paper so it's easier for me to come in and say
10 "Page 3, line 26," as opposed to saying to the Court
11 "Three lines up from the bottom," but, in any event. . .

12 Under the argument section, which would be the first
13 full paragraph on page 3, the Government indicates that the
14 Booker Court upholds the remainder of the Guidelines as the
15 most appropriate benchmark for informing Courts.

16 Well, I reread, when I received this, I reread Booker
17 for the 47th time and there simply is no language in there to
18 that effect whatsoever.

19 As the Court is aware, the Courts are split on this
20 issue as to what weight to give the Guidelines. There is the
21 Judge Wilson -- Judge Cassell, rather -- in the Wilson case,
22 the Wilson school of thought, which says that you give
23 substantial weight to the Guidelines.

24 Then there is the Ranum school, Judge Edelman's school
25 of thought, both of which had adherence that says, "No,

1 the Guidelines are only one of several factors to be taken
2 into consideration and to be given no more weight than the
3 other factors" and, of course, Judge, the Wilson school is the
4 school The Department of Justice advocates and the Judge
5 Edelman Ranum point of view is that which the Defense Bar
6 advocates -- that's why God created prosecutors and defense
7 lawyers -- and there is no Appellate Court in the country yet
8 that has yet decided that issue.

9 So, the only decisions that we're seeing are District
10 Court decisions on that issue. I researched the issue and I
11 didn't see anything by this Court on what side it comes down
12 on.

13 On page 4, the Government states that a sentence
14 within the advisory Guidelines is reasonable, per se. No case
15 is cited in support of that. I have a few cases that say
16 otherwise, and I'll just cite them, if I may, to the Court.

17 If Your Honor will bear with me for one moment,
18 please.

19 There is, of course, the Ranum decision, which I
20 mentioned.

21 Does the Court require that I point out the page or
22 the citation?

23 THE COURT: No.

24 MR. ELLIS: The other two cases that say that a
25 sentence within the advisory Guidelines is not, per se,

1 unreasonable are United States versus Huerta-Rodriguez, 355
2 Supp. 2d 1019, District of Nebraska, 2005, and U.S. versus
3 Phelps, P-h-e-l-p-s, 366 Supp. 2d 580, Eastern District of
4 Tennessee, 2005. Again, no appellate cases on this issue.

5 Back to the Government's sentencing memorandum. The
6 Government cites on page 5, the second paragraph, it remains
7 true that absent unusual circumstances, the sentence in a
8 criminal case should fall within the Guideline range. Again,
9 this is not accurate. Ranum says, does not use the words
10 "unusual circumstances" and, again, the test we would submit is
11 is the sentence greater but not sufficient, but not necessary,
12 sufficient but not greater than necessary to achieve the
13 purposes of sentencing, et cetera, et cetera.

14 On page 8 where the Government discusses the offense
15 in the context of Cowen's life, I just wanted to point out that
16 Mr. Cowen was not simply distracted from the time of his wife's
17 giving birth in July. I recognize this offense occurred,
18 continued from April to December, but as the Court will recall,
19 Mrs. Cowen was put under bed rest from April onward when she
20 started experiencing difficulties with her pregnancy. Again,
21 this is not an excuse for his behavior. We just pointed this
22 out so as to put Mr. Cowen's behavior in context.

23 At page 9, Footnote 3, the Government discusses the
24 public safety factor. The Bureau of Prisons, as the Court is
25 aware, has several public safety factors. Some of them are,

1 indeed, designed to protect the public. For example, the
2 Bureau of Prisons has what's called a Sex Offender Public
3 Safety Factor which precludes anybody with a sex offense from
4 going into a camp, and the Bureau's rationale is quite
5 understandable. They are concerned somebody might walk off a
6 Federal prison camp -- as the Court is aware, there are no
7 fences around a Federal prison camp -- and molest a child in
8 the neighboring community. I have no quarrel with that.

9 Similarly, people who have committed violent crimes
10 are assigned what's known as a greater severity, greater
11 severity public safety factor. Again, no problem with that
12 because I don't want somebody to walk off a Federal prison camp
13 and committing a violent crime.

14 With respect to the serious telephone abuse, I really
15 can't say the same, that it's there to really protect the
16 public from somebody who walks off, and I have a copy of that
17 public safety factor, if the Court would like to see it.

18 THE COURT: Certainly.

19 Do you want to share it first with Mr. Hanusik?

20 Have you seen that as well?

21 MR. HANUSIK: I have not. I don't dispute if
22 Mr. Henderson says it's a public safety factor for the Bureau
23 of Prisons, then it is.

24 MR. ELLIS: What I starred is the section that would
25 apply to Mr. Cowen.

1 THE COURT: Thank you.

2 MR. ELLIS: Again, as Mr. Henderson states, this would
3 cause him to be incarcerated in a low level security facility,
4 as opposed to a minimum. As the Court is aware, the BOP has
5 four levels, minimums, which are the camps, lows, which are the
6 next level, mediums, which are the next level, and highs, which
7 are the penitentiary.

8 You find very few white collar offenders in lows. It
9 can be a pretty dangerous place.

10 Next comes the restitution analysis and, as the Court
11 is aware, in our sentencing memorandum we addressed two issues.
12 Our major issue is that procedurally the Government was
13 required to provide the information, the identity of the
14 individual victims and how much was owed to them, 60 days prior
15 to the original sentencing date which was February 23.
16 Probation advises this did not happen.

17 The next step is that if Probation or the Government
18 feels an extension of time for the restitution hearing is
19 required, that it asks the Court within 10 days prior to this
20 sentencing date to do so and, again, neither -- well, the
21 probation officer indicates in its PSI there may be a need for
22 that because the individual victims cannot be identified at
23 this time, but, again, that report was filed on Friday and
24 that's not, you know, within or outside the 10 day period and
25 the Government has made no request for this 90 day hearing.

1 Our position would be --

2 THE COURT: I'm sorry. What report were you
3 indicating was filed on Friday?

4 MR. ELLIS: The presentence investigation report.

5 No?

6 THE PROBATION OFFICER: Your Honor, in reference to
7 Probation, the law actually states that the Government has to
8 notify Probation --

9 MR. ELLIS: Right.

10 THE PROBATION OFFICER: -- within 60 days.

11 MR. ELLIS: Did I misspeak? I'm sorry.

12 THE PROBATION OFFICER: What has happened is the
13 Government has actually, while it did not notify Probation and
14 provide Probation a list of the victims, what it has done is
15 there is a receivership and there is a person who has been set
16 up who is actually, has the list and the individual victims
17 have been identified, and once Probation was notified of this,
18 the Government actually took on the cost of sending out the
19 letters notifying the victims and Probation was informed that
20 that was done and Probation actually was in contact with the
21 person in Washington, and our restitution person spoke to the
22 person in Washington and coordinated that activity. So, that
23 was done and that prong of the statute was satisfied.

24 THE COURT: Thank you, Ms. Speas.

25 THE PROBATION OFFICER: And the information in the

1 original PSI that was disclosed in May notified the Court there
2 may be additional victims, because I misunderstood a chart that
3 was provided to me that identified some additional -- I
4 misunderstood there were additional victims outside of the one
5 group when, actually, it was victims within the same group but
6 under a different heading, once I spoke to Mr. Hanusik and he
7 assured me it was all within the same group -- it was just a
8 sub-group heading -- then I took that wording out in the
9 revised PSI that was disclosed on Friday.

10 That's what the attorney is speaking of.

11 So, while the Court may be able to proceed today and
12 make a finding as to restitution, I don't have the individual
13 names and addresses myself. The Government does, and the
14 Government will be able to provide me a list that I can give to
15 the Clerk's office.

16 The amount can be determined by the Court. It can do
17 it today or it can do it within 90 days. The amount, the
18 Government is ready to proceed with.

19 The notices have been met. The statute has been met.
20 Probation is satisfied and I believe all the requirements have
21 been met, Your Honor.

22 THE COURT: Thank you, Ms. Speas.

23 THE PROBATION OFFICER: Thank you.

24 MR. ELLIS: Your Honor, if I can briefly respond to
25 that?

1 18, U.S.C., § 3664(a) provides that "For Orders of
2 Restitution under this title, the Court shall order the
3 probation officer to obtain and include in the presentence
4 report or in a separate report, as the Court may direct,
5 information sufficient for the Court to exercise its
6 discretion in fashioning a Restitution Order. The report
7 shall include, to the extent practicable, a complete
8 accounting of the losses to each victim, any restitution
9 owed," et cetera, et cetera.

10 We have not seen that. I don't know if the Court has
11 seen that.

12 The Court clearly cannot enter a Restitution Order
13 today without having that information in front of it. The
14 Court can't just simply say "Pay the restitution over to the
15 receiver or to the SEC."

16 It has to be paid -- the Order has to specify the
17 victims, the amount they are owed and so forth.

18 THE COURT: Perhaps we can just all agree on a date
19 within the next 90 days to bring you all back for that and I
20 can direct Probation to prepare a separate report with that
21 information as § 3664 allows for.

22 MR. ELLIS: Yeah.

23 The only problem with that is that in order to trigger
24 that, Probation or the Government -- under 3663(d)(5) it
25 indicates that within 10 days prior to sentencing, the attorney

1 for the Government or the probation officer shall so inform the
2 Court and the Court shall set a date for the final
3 determination of the victims' losses not to exceed 90 days
4 after sentencing, and while Probation may have indicated that
5 the losses are not ascertainable in its draft PSI -- I don't
6 know whether the draft PSI in this District is filed with the
7 Court. Routinely, it's not. It's the final version that is
8 filed with the Court, and I believe that final version was
9 filed with the Court on Friday which, of course, is not outside
10 the 10 days.

11 THE COURT: No, the PSI was prepared before Friday.

12 MR. ELLIS: So, does the Court --

13 THE COURT: And I received it before Friday.

14 What Ms. Speas indicated, it was revised to delete
15 those portions on Friday. I had it before then.

16 MR. ELLIS: Did the Court have it within 10 days or --

17 THE COURT: I don't have the exact date I received it,
18 but I know I had it well before. In fact, Mr. Negrete,
19 Mr. Hanusik and I had a telephone conference when we were
20 discussing today's sentencing date with respect to the
21 disclosure of the presentence report.

22 MR. HANUSIK: That's correct, Your Honor, and that's
23 before the last sentencing date. Certainly more than 10 days
24 ago.

25 THE COURT: Yes.

1 MR. ELLIS: Well, I'm not going to argue the point.
2 You know, frankly, I feel a little strange arguing, you know,
3 technicalities.

4 I'm a sentencing authority. I deal in equity. The
5 law is the law, and there is an 11th Circuit case on
6 restitution, United States versus Maung, 267 F.3d 113 at 117,
7 11th Circuit, 2001. In that case the restitution hearing was
8 held beyond the 90 days.

9 The Government argued that --

10 THE COURT: We won't do that here. I assure you we'll
11 hold it well within the 90 days, and I am very familiar with
12 that jurisdictional prerequisite. It has to be within the 90
13 days.

14 MR. ELLIS: Yes, it does.

15 I just want to point out the Court of Appeals made
16 clear the law is the law.

17 THE COURT: I am ever mindful I must follow the law as
18 well.

19 MR. ELLIS: Okay.

20 THE COURT: In fact, can we give them a restitution
21 date, Patricia, right now? You can put it in your calendars.
22 Mr. Negrete will be in China for some time. We can do it
23 probably near the end of July.

24 Does that give the Government enough time,
25 Mr. Hanusik, or early August?

1 MR. HANUSIK: Early August would be preferable. I
2 don't think I'm available in July.

3 THE DEPUTY CLERK: August 5th is a Friday. Is that a
4 good day for everyone?

5 MR. NEGRETE: I don't have the benefit of my calendar
6 here. I tend to have bad luck picking dates.

7 If I have a conflict, I would like to advise the Court
8 and will do so immediately. I believe August 5th would be
9 okay.

10 MR. HANUSIK: I don't know if Mr. Negrete remembers
11 this, but I think during our telephone conference call that was
12 one of the dates he suggested for sentencing.

13 I think your calendar is pretty clear.

14 THE COURT: We'll set aside the whole day for your
15 restitution hearing. If you need less time, let us know.

16 MR. HANUSIK: Thank you, Your Honor.

17 MR. NEGRETE: August 5th at what time?

18 THE COURT: Starting at 8:30.

19 MR. NEGRETE: Thank you, Your Honor.

20 MR. ELLIS: And, Your Honor, I have been informed and
21 was informed by the reading of the transcript in the Huard
22 case, that this Court reads everything, which is why we made
23 sure we filed our sentencing memorandum and appendix 10 days
24 prior to sentencing.

25 With that having been said, unless the Court wants to

1 hear from me to hit the highlights of our sentencing
2 memorandum, I know the Court in Huard indicated that it had
3 arrived at a tentative sentence and Mr. Robinson, the counsel
4 for Huard, says what I always say, which is "A good lawyer
5 knows when to sit down and shut up."

6 If the Court does have in mind a tentative sentence or
7 has, and/or has any questions for me, I would be happy to
8 address it at this time.

9 THE COURT: No, I don't have a tentative sentence in
10 mind.

11 I think there were certain issues you raised in your
12 sentencing memorandum, namely, that I believe the defendant's
13 position here is that the sentence I gave the Codefendant Huard
14 in some way places a cap on whatever sentence it is I should
15 impose here, and that if I were to oppose any sentence that
16 included a period of incarceration, it would be far too
17 punitive, particularly -- I am paraphrasing -- particularly in
18 light of the sentence Mr. Huard received, notwithstanding the
19 fact Mr. Cowen has scored out higher under our advisory
20 Guidelines than did Mr. Huard.

21 So I am keeping an open mind to hear your arguments.

22 MR. ELLIS: Very good.

23 I am not arguing -- I have not suggested Mr. Huard's
24 sentence is a cap on what you could oppose on Mr. Cowen.
25 Indeed, we proposed a sentence that is 50 percent greater than

1 Mr. Huard.

2 THE COURT: Well, a cap in the sense incarceration
3 should not be a potential sentence in this case, that all I
4 should consider is sentencing Mr. Cowen to five years probation
5 and double up the special conditions.

6 MR. ELLIS: Yes, essentially so. Again, it's not just
7 on disparate reasons alone.

8 Page 32 of our sentencing memo indicates, goes through
9 the four purposes of sentencing under 18 U.S.C. § 3553(a)(2)(A)
10 and talks about the first purpose of sentencing, the first goal
11 of sentencing is retribution, and, again, the only thing I
12 would say there is -- again, this is candidly, perhaps, not our
13 strongest argument because the Court could decide more
14 punishment is necessary for Mr. Cowen than Mr. Huard.

15 I would point out, however, we have argued Mr. Cowen,
16 as has Mr. Huard, as was Mr. Huard, been already punished
17 significantly.

18 His health, the fact that he is, basically, out of
19 work at this point, and, so, insofar as the purpose is to
20 provide just punishment, I am not saying he has been punished
21 enough, but he has been significantly punished.

22 With respect to the second goal of sentencing,
23 deterrence, if we're talking about general deterrence, I think
24 the Court has spoken in the Huard sentence that by placing him
25 on probation, this case did not require a sentence of

1 imprisonment to deter others from doing the same thing.

2 With respect to specific deterrence for Mr. Cowen,
3 again, we point out he is very, very unlikely to reoffend. I
4 gave the Court some data from the Sentencing Commission which
5 shows that people over 50, the likelihood of recidivism is 6
6 percent, which is the lowest for any age group in the study,
7 and I don't think anybody would seriously question Mr. Cowen is
8 going to go out and commit another crime.

9 A sentence of probation meets the third goal of
10 sentencing, protecting the public. I don't think anybody here
11 would argue Mr. Cowen is a threat to the public and, again, I
12 cited the 6.2 percent figure from the Commission's report.

13 Finally, a sentence of probation meets the fourth goal
14 of sentencing, meeting the defendant's needs. Mr. Cowen has
15 some serious health problems that can be better addressed in
16 the community and 18 U.S.C. § 3553(a)(2)(D) says the fourth
17 goal of sentencing is to provide -- this is on page 36 --
18 provide the defendant with needed education or vocational
19 training, medical care or other correctional treatment in the
20 most effective manner, and as Dr. Faerstein has pointed out in
21 his report, the most effective manner would be to treat him in
22 the community at, of course, a savings to the Government.

23 Unless the Court has any questions?

24 THE COURT: I think we'll hear Mr. Hanusik's response
25 and then you, perhaps, could address these points again.

1 Thank you.

2 MR. HANUSIK: Thank you, Your Honor.

3 As Your Honor knows, we received the sentencing memo
4 from the defendant last Thursday. I spent the majority of my
5 time over the weekend responding to it, but, really, focusing
6 on the restitution issue, not some of these other issues.

7 Frankly, there is a good reason for that. The reason
8 is, basically -- if I could sort of address the points in order
9 that Mr. Ellis raised them. He talked about Mr. Cowen has
10 already been punished and, therefore, should get probation
11 based on the impact on his health, the fact he is out of work
12 and the other sort of collateral consequences that come along
13 with pleading guilty to a felony.

14 I don't dispute any of that is true, Your Honor, but I
15 would point out that the United States has made a significant
16 reduction recommendation on top of a reduction that was already
17 given in the form of a five year cap.

18 No one is suggesting -- I don't quibble with whether
19 the words "Guideline range" is correct or not, but the United
20 States is saying the 40 percent should come off whatever you
21 determine to be the reasonable range.

22 I don't think anyone could legally argue you could go
23 above 60 months and determine that to be reasonable when you
24 have a 60 month cap. I think we're all on the same page, but I
25 do think we're talking about 40 percent off what you determine

1 to be reasonable. You may determine it's less than 60 months
2 as well, but we are not really in dispute on that issue.

3 I think the issue with respect to Mr. Huard and the
4 comparison is one that the Court seems interested in and I'd
5 like to address for a minute.

6 As I mentioned earlier, Mr. Huard was the first person
7 in the door and Mr. Huard certainly gets more credit for that.
8 I would also point out Mr. Huard pled only to the undercover
9 kickback scheme. Mr. Cowen had a more expansive plea that
10 involved the manipulation and the undercover kickback scheme.

11 The difference, really, is that under the advisory
12 Guidelines, what were then the mandatory Guidelines,
13 Mr. Huard's was looking at 46 months. Mr. Cowen is looking at
14 87. He got an immediate benefit of 27 months by going to a 60
15 month cap.

16 If the Court were to start there and accept the
17 Government's recommendation and take 40 percent off, that would
18 be an additional 24 months.

19 If, with respect to looking at it in terms of time,
20 Mr. Cowen would be getting 51 months off. That's more than
21 Mr. Huard was ever facing. Mr. Huard was only facing 46
22 months.

23 The loss was a different amount for Mr. Huard. It was
24 \$1.5 million. It was all intended loss, no real loss. Here we
25 have real loss by virtue of the Lancer investors who were

1 defrauded as a result of the conspiratorial conduct Mr. Cowen
2 participated in.

3 Mr. Cowen's plea agreement stops both him and the
4 Government for arguing for any further adjustments to the
5 agreed upon Guidelines.

6 Mr. Cowen's lawyer told me the other day they were
7 going to argue for not adjustments, but variances. Those
8 variances seem to consist of economic hardship, collateral
9 consequences, aberrant behavior and family responsibilities.
10 When I look at the Guidelines, advisory or mandatory, those are
11 all departure bases under the Guidelines. 5K2.12 is economic
12 hardship. 5K2.20 is aberrant behavior, and 5H1.1 or 4, which
13 is the family responsibilities and health issues.

14 The health thing, I'm not a doctor, so I don't know
15 where he could be best served, but I did take a look at
16 Mr. Ellis' very informative book on Federal prisons last night.
17 There are 15 facilities that I found on the west coast, western
18 region of the United States. 10 of those facilities have
19 in-patient care and the other 5, out-patient care. I think he
20 can be served, certainly, in terms of his health issues at a
21 Federal prison facility.

22 With respect to the one other issue, general
23 deterrence, I would just point out that Mr. Ellis may or may
24 not believe probation is an appropriate deterrent value for
25 someone like Mr. Cowen. Mr. Cowen did have an SEC injunction

1 against future violations of the security laws in 1999. That
2 was not an effective deterrent based upon the conduct, the
3 offense of conviction for which he pled guilty in 2003.

4 So, I don't know -- I understand the SEC is a civil
5 enforcement mechanism, but it still is a Federal Court
6 injunction that is mandated or it might be an administrative
7 court injunction in that situation.

8 The fact is it's an injunction against future
9 violations of the Federal securities laws. It was not an
10 effective deterrent with respect to the crimes that were
11 committed in this case.

12 So, I think that the United States has made an
13 appropriate recommendation of 40 percent downward departure and
14 I think that reflects both the extensive level of cooperation,
15 which we certainly credit to Mr. Cowen. I don't think there is
16 a big disparity between him and Mr. Huard because I think
17 Mr. Huard pled guilty to a different, basically, lower level
18 offense. He was first in the door and, frankly, even if one
19 were to take all the time off of Mr. Huard, it's still not as
20 much as the Government is recommending comes off Mr. Cowen when
21 you consider the different starting months of 87 months versus
22 46 months.

23 I don't have anything else to add. I think the rest
24 is set forth in our sentencing reply.

25 THE COURT: Thank you very much.

1 MR. ELLIS: Can I respond briefly, Your Honor?

2 THE COURT: Certainly.

3 MR. ELLIS: Your Honor, the 11th Circuit has held that
4 the 60 months in this case is the starting point for any 5K1.1
5 departure. That's cited on page 29 of our sentencing
6 memorandum, U.S. versus Rodriguez, 64 F.3d 638, 11th Circuit,
7 1995.

8 Next, with respect to Huard, if I'm not mistaken, I
9 think the Government found, the Government argued the loss in
10 Huard's case was \$6.2 million, the intended loss, as opposed to
11 Mr. Cowen's 4.3.

12 MR. HANUSIK: He is mistaken, Your Honor.

13 MR. ELLIS: I am mistaken?

14 MR. HANUSIK: Yes.

15 MR. ELLIS: With respect to departures and variances,
16 departures, as the Court is aware, are policy statements under
17 the Guidelines. Variances are, really can be anything, even
18 those things that are prohibited departures, such as lack of
19 useful guidance could now be grounds for a variance.

20 So, I think the Supreme Court and I think all the
21 commentators recognized that.

22 Finally, I neglected to mention, 18 U.S.C. §
23 3553(a)(1) says that the Court, in determining the particular
24 sentence to be imposed, shall consider the nature and
25 circumstances of the offense -- I think we have addressed

1 that -- and the history and characteristics of the defendant.

2 In this case, Mr. Cowen has extraordinary community
3 and public service and, indeed, had he not agreed not to seek a
4 downward departure, I think I can say with a straight face that
5 even though that ground for a downward departure is what's
6 called a discouraged one, there are ample grounds for this
7 Court to, were it permitted, to depart based on other than
8 5K1.1 consideration, that this would have been a ground to
9 depart.

10 It's certainly a ground for a variance, and
11 Mr. Cowen's civic and charitable work as described at page 18
12 of our sentencing memorandum and also in the appendix itself.

13 THE COURT: Mr. Hanusik.

14 MR. HANUSIK: If I said \$1.5 million intended loss by
15 Mr. Huard, I misspoke by half. He had two separate cases. It
16 was zero actual loss. The intended loss was the same in each
17 case of \$1.5 million.

18 I don't remember exactly the Medinah case. That was
19 Mr. Hong's case. I am pretty sure that was the intended loss,
20 not 6.2.

21 MR. ELLIS: I got the \$6.2 million figure from the
22 PSI.

23 THE COURT: All right.

24 MR. NEGRETE: Good morning, Your Honor.

25 I had been given the task of addressing restitution,

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1 so I drew the short straw here. I think that's going to come
2 from another day.

3 . . . Being the passionate person I am here, they have given
4 me the task of the passionate testimony, and if I may, there
5 are several people here today and I would like to know if the
6 Court is willing to have them testify and explain or give the
7 Court a brief description of their feelings with respect to
8 sentencing.

9 Is that acceptable?

10 THE COURT: Certainly.

11 MR. NEGRETE: I would like to call Ms. Carrie Rundle.

12 CARRIE RUNDLE, DEFENDANT'S WITNESS, SWORN.

13 DIRECT EXAMINATION

14 MR. NEGRETE: May I proceed, Your Honor?

15 THE COURT: Please.

16 BY MR. NEGRETE:

17 Q. Ms. Rundle, are you familiar with Mr. Cowen?

18 A. Yes.

19 Q. What is your relationship with Mr. Cowen?

20 A. I am his mother-in-law.

21 Q. How long have you known Mr. Cowen?

22 A. Since about 1998.

23 Q. What is the relationship that Mr. Cowen has with your
24 family?

25 A. Well, he is an anchor in our family, a strong member of our

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1 family. We have had some ups and downs in our family. Bruce
2 has always been there and always has been the anchor.

3 When my husband, Katherine's father, had a serious
4 bout with cancer, which was extremely life-threatening, and her
5 baby, their baby was due two days later, Bruce was the one who
6 took care of the family in Southern California while I took
7 care of Bill and the family in Northern California and he, he
8 has always been there for us. He is a good person, a good man,
9 wonderful father, a good son.

10 I would love it if he were my son. He has elderly
11 parents and he cares for them. He has an almost four-year-old
12 little boy who he is a wonderful role model to this child and
13 we would have a sad life without Bruce.

14 Q. Ms. Rundle, your family has gone through some crises
15 within the past year?

16 A. Sure.

17 Q. How has been Mr. Cowen with respect to those incidents or
18 those events?

19 A. He is always there for us and he has a way of dealing with
20 what happens when it happens, and he does it on a very logical,
21 in a very logical way, and he has a solution. It doesn't
22 always work because you are dealing with other people, but, for
23 the most part, his solution is right most of the time.

24 Q. Do you feel that the absence of Mr. Cowen will have an
25 effect on your family?

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1 A. Yes, yes.

2 Q. How do you believe it will affect your family?

3 A. Well, it will affect his son. My entire career was
4 teaching severely emotionally disturbed children who had been
5 traumatized.

6 It is my belief children need their parents, a father
7 or mother, if possible, or a father or a mother. Bruce is a
8 good father. He is a good uncle. We have had some drama in
9 our family with one of our daughters, and he has been a role
10 model for those children.

11 He is a wonderful stepfather. This is the reason that
12 I learned to love Bruce was early on he was so good to our
13 grandchildren, Katherine's children by a previous marriage and,
14 I mean, I could tell -- I have worked with people. I worked
15 with children -- I could tell it was a sincere effort on his
16 part and I knew this is why I learned to love him. He is a
17 good man, a good guy.

18 MR. NEGRETE: Thank you.

19 Your Honor, I have no more questions of this witness.
20 I don't know if the Government has cross.

21 MR. HANUSIK: No questions, Your Honor.

22 THE COURT: Thank you, Ms. Rundle.

23 THE WITNESS: You're welcome. Thank you.

24 MR. NEGRETE: Your Honor, I was going to address the
25 issue of cooperation also and it was my offer of proof, I was

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1 going to call Agent Edy of the FBI to describe the level of
2 cooperation Mr. Cowen has provided.

3 Does the Court believe that is necessary? He
4 substantially cooperated.

5 THE COURT: I think that's understood.

6 MR. HANUSIK: We made a motion to that effect.

7 THE COURT: The Government's motion and 40 percent
8 request for reduction.

9 MR. NEGRETE: Thank you, Your Honor.

10 Next, if I may, I believe Mr. Ellis had one more point
11 he wanted to cover. I might have one other witness after that,
12 Your Honor.

13 THE COURT: Very well.

14 MR. ELLIS: It's an old story about there is three
15 Supreme Court arguments that a lawyer makes, the one that he
16 intends to make, the one that he makes and the one afterwards
17 that he wished he made.

18 Just to make sure I cover everything.

19 With respect to disparate, as the Court is aware -- of
20 course, it presided over the cases -- Kelly and Price were
21 acquitted, went scot-free.

22 The Court was, as is commonly called, the 13th juror
23 in that case. Only the Court knows in its heart whether or not
24 Kelly and Price caught a real break.

25 I just have a problem with one of my clients going to

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1 jail when people who were, obviously, more culpable than him
2 slid. Is that the right expression?

3 MR. HANUSIK: I guess I could only address that, Your
4 Honor, by saying the Government, obviously, respects the
5 verdict of the jury in those cases.

6 I am not intimately familiar with the Price case, so I
7 can't really speak to that. I don't think Mr. Cowen had
8 anything to do with the Price case.

9 With respect to the Kelly case, I think everyone
10 recalls pretty well there was a lot of discussion, about 35 or
11 40 tapes which included both Mr. Kelly -- excuse me --
12 Mr. Huard and Mr. Cowen and only one significant tape, half of
13 which was erased through some malfunction, which included
14 Mr. Kelly and, again, I would just point out, like Mr. Huard,
15 the sentences that were -- excuse me -- the results of that had
16 only to do with the undercover operation and not the additional
17 manipulation for which Mr. Cowen has entered a guilty plea.

18 THE COURT: Thank you.

19 Mr. Negrete.

20 MR. NEGRETE: Thank you, Your Honor.

21 Before I forget, I would like to thank the Court and
22 thank Mrs. Speas for her work on this rather complex report
23 that she prepared. It wasn't an easy task. We spent a great
24 deal of time. I do think she did a thorough job.

25 THE COURT: She always does.

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1 MR. NEGRETE: Excuse me?

2 THE COURT: She always does.

3 MR. NEGRETE: She certainly does. I think she went
4 the extra mile in this case and I appreciate her.

5 Also, I would like the Court to be mindful, and we
6 briefed it thoroughly in our brief about Mr. Cowen's health
7 concerns.

8 These are very serious, not to be taken lightly -- I
9 am sure the Court won't -- and I think they should affect the
10 type of sentence he receives.

11 Also, I have personally been very proactive with
12 trying to achieve resolutions with the Government on the civil
13 side, the SEC and the receiver.

14 Now, this may go to the restitution, but he certainly
15 has demonstrated his cooperation, and since there seems to be a
16 link between the restitution insofar as amount, he has done the
17 right thing. He has come forward to the Government, to the
18 Court and voluntarily gone the extra mile with the civil side
19 in trying to craft his own restitution or do the right thing.

20 Now, obviously, he has entered his plea, but the plea
21 doesn't address his need or desire to go the extra mile with
22 the Government. He voluntarily went forward.

23 There was some reference to an Administrative Order.
24 He has violated no Order in his conduct here today. Nor has he
25 in the past. That restriction was gone long ago, and, again,

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1 in that situation he came forward and did the right thing. We
2 have explained it in our brief.

3 Finally, Your Honor, I think Mr. Cowen would like to
4 give a statement to the Court indicating his position and his
5 present feelings, and if the Court welcomes that, I would truly
6 appreciate it.

7 MR. HANUSIK: I would just address one thing. I think
8 I made this very clear in our response to the defendant's
9 sentencing memo.

10 Perhaps this is sort of an opportunity for Mr. Cowen.
11 You have now set the restitution hearing date as at August 5th,
12 2005. It is my understanding Mr. Cowen has not paid any money
13 to the SEC or the receiver for the benefit of the defrauded
14 investors.

15 To the extent that he does that between now and August
16 5, the Government's position will clearly be that he should be
17 credited for the payments made in any Restitution Order that
18 this Court would enter on that date.

19 So, we absolutely will credit him for any amounts that
20 he pays to the SEC and/or to the Lancer receiver when we make
21 our arguments concerning restitution.

22 THE COURT: Thank you.

23 MR. NEGRETE: Yes, Your Honor. On that point, the
24 SEC's remedy was not seeking monetary compensation. We have
25 dealt with that.

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1 The receiver is more of a unique situation. In fact,
2 we wanted to create something. They are in a chicken and egg
3 situation. They are looking to the Court on one side, our
4 representative of the estate. So we are in ongoing
5 negotiations and I believe we'll come to some agreement, but we
6 are constantly faced with this chicken and egg battle which,
7 hopefully, between the Government and myself and the receiver,
8 we'll reach some sort of conclusion, but those negotiations
9 have been ongoing all the way up to yesterday and I believe
10 they will continue to go forward. I'm pretty confident that
11 we're going to achieve a civil settlement.

12 One of the key factors with the receiver, the SEC and
13 the Government has always been the cooperation of Mr. Cowen and
14 his almost unique testimony, information, ability to assist in
15 their cases. Up to now he was very proactive with the SEC in
16 providing deposition testimony. I had countless hours of
17 interviews with the SEC, as did Mr. Cowen.

18 The receiver has a greater task because they are going
19 to be facing, essentially, the key target and several corporate
20 targets in their investigation and remedies. They are going to
21 far exceed whatever loss there is in this case or whatever
22 remedies in this case, and we have indicated we want to fully
23 cooperate.

24 We didn't ask any conditions to that cooperation, just
25 Mr. Cowen believed that was the right thing to do. That has

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1 been his demeanor throughout.

2 I can assure the Court the negotiations are
3 continuing. If you would like to craft some Order tied to that
4 and, as Mr. Hanusik indicates, have accreditation, that would
5 be helpful.

6 That is the status as it is right now.

7 MR. HANUSIK: I should be real clear. The
8 Government's position, to the extent money is actually paid by
9 August 5th, we would credit Mr. Cowen with that.

10 Mr. Negrete mentions the SEC offer of settlement does
11 not include a monetary payment. I would point out in the
12 sentencing memo filed on behalf of Mr. Cowen, I should say,
13 Mr. Cowen's counsel argued the appropriate parties to pay
14 restitution to the SEC and/or the Lancer receiver.

15 I am fairly confident -- I can't speak on behalf of
16 the SEC -- I am fairly confident if Mr. Cowen offered to pay
17 the SEC some money, they would accept it.

18 MR. NEGRETTE: Actually -- if I may, Your Honor --
19 that's not necessarily the case. Nobody has identified the
20 victims. That's the problem.

21 As it relates to Mr. Cowen, the concept of the
22 creation of a fund is a good idea and an idea we welcome, but
23 each one is faced with who do you pay, and it's not as simple
24 as just giving it to the receiver because there could be a
25 burden to the victims in the receiver processing of such funds

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1 that are established.

2 We wouldn't wanted those funds to be consumed by
3 attorneys' fees in administering those funds. The SEC doesn't
4 necessarily want to be involved with that, although we welcome
5 that.

6 We have a very good relationship with the SEC if such
7 fund is created. I think the concept here is once we can
8 identify where we can place such a fund or how we could have it
9 administered, we're ready to do that.

10 Payment at this level just hasn't been discussed
11 because there is nobody to pay. Nobody has come forward.
12 There was no response to the victim loss request.

13 So, we don't have Aunt Minnie in Palm Beach that has
14 her \$100,000 waiting to get paid. Nothing like that is
15 probably going to come forward as it relates to Mr. Cowen.

16 There is a good explanation to that, because most of
17 the investors, virtually all of them, looked to Mr. Lauer as
18 being the source of payment, or the various auditors.

19 Now, apart from Mr. Cowen's desire to do the right
20 thing and pay, as a practical matter, the receiver and the SEC
21 has to look upon certain corporate entities that were involved
22 with Mr. Lauer and that will ultimately be where the \$1.36
23 billion or hundreds of millions of dollars of losses could be
24 recovered.

25 For that, Mr. Cowen is ready, willing and able to

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1 assist.

2 THE COURT: All right. I'll hear from Mr. Cowen.

3 Thank you.

4 MR. ELLIS: Your Honor, before Mr. Cowen comes up, one
5 last thing, if I may.

6 Mr. Hanusik was kind enough to refer to our Federal
7 Prison Guide Book which, incidentally, is a 2002 edition. The
8 2005 will be out in September, and if the Court issues a
9 published opinion here, I would ask the Court note that it's a
10 pre-publication discount. Anyway, all kidding aside.

11 Mr. Hanusik says his reading of the book indicates
12 there are about 10 or 15 facilities that offer medical care.
13 In point of fact, there are only five. They are called Federal
14 Medical Centers. They are at Rochester, Minnesota,
15 Springfield, Missouri, Lexington, Kentucky, Danvers,
16 Massachusetts and Butner, North Carolina. All the facilities
17 have a physician's assistant on call whose unfortunate response
18 to many individuals is "Here is a Tylenol. Get over it."

19 My final words of advice to any of my clients for
20 departing to a Federal prison is don't get sick.

21 Thank you.

22 MR. HANUSIK: I would just point out, Your Honor, I
23 was just not referring to the five medical facilities that are,
24 basically, medical prison camps. I was saying according to the
25 2002 edition of Mr. Ellis' book, there are 15 total BOP

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1 facilities in the western region of the United States where,
2 presumably, Mr. Cowen would be sentenced within 500 miles of
3 his home and my review last night of those 15 facilities and
4 the write-ups -- it's sort of like a Fodor's Guide to Federal
5 Prisons -- and in each of them it lists what sort of healthcare
6 is available. 10 of them have in-patient care. Many, at least
7 according to your book, have two or three physicians, not just
8 physicians' assistants on staff. The other five have
9 out-patient care.

10 That was my only point.

11 THE COURT: Thank you.

12 Mr. Cowen.

13 THE DEFENDANT: First of all, Your Honor, I would like
14 to apologize to the Court. I would like to apologize to anyone
15 that I have hurt, apologize to my family. It was never my
16 intention to hurt anyone, but I know I have hurt people. So,
17 I'm not shying away from that.

18 When I pled guilty, I made a deal with myself that I
19 was going to be the best cooperator ever, and I think I have,
20 and I have had some extraordinary compliments paid to me by the
21 FBI and also by the U.S. Attorney's Office because I didn't
22 want to be the simple cooperator. I wanted to be able to help
23 more than anybody else could.

24 I know the Government has issued a letter. I don't
25 want to go further into that, but that was my goal in life. I

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1 instructed my attorney when the SEC came forward, we offered to
2 cooperate. At that time I wanted to cooperate. We have been
3 trying to cooperate with the receiver and there have been some
4 obstacles of doing that, but with this proceeding over, I think
5 those obstacles will be behind.

6 I think in administering justice, which you are going
7 to do today, the only thing that I ask you is a couple of
8 things to consider. One is to let me continue to cooperate. I
9 think the victims would be benefited if I'm able to actively
10 participate with the Justice Department, with the SEC, because
11 there is still going to be more there, and with the receiver.
12 I think I would be most useful to them and most useful to the
13 victims.

14 The second part is that -- we haven't mentioned
15 this -- is that my parents are 90 and 80-years-old and in
16 severe declining health.

17 I have not told my parents. This is based on a
18 discussion, an agreement with my brother and myself and with
19 medical doctors because of what it could do to them. Everyone
20 else in my family knows and, in fact, my 85-year-old aunt, who
21 is my father's only living sibling, supports that and called
22 just this Sunday before knowing we were on our way here and
23 we're all very concerned about my parents and what effect it
24 will have on them.

25 My brother isn't here today and he wanted to be here

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1 today but today is a strict Jewish holiday, Shavu'ot. It
2 relates to Moses handing down the Ten Commandments towards the
3 Torah to Moses. He wishes he was here, but he is here in my
4 spirit.

5 There are two types of justice I have to live with.
6 One that you're going to administer today, but also divine
7 justice, and I have been struggling with both and, you know,
8 God is forgiving and I have, you know, let's say cleaned up my
9 act both ways, and the only thing I would finally like to say
10 is, you know, I have the most wonderful wife and son. I am
11 very concerned about, you know, the effect on Jacob. Katherine
12 is a strong woman, but I am concerned with what my being away
13 would do to him, and I would just ask Your Honor to consider
14 those in rendering a sentence.

15 Thank you.

16 THE COURT: Thank you.

17 MR. NEGRETE: Your Honor, I think one thing that is
18 important to consider, I think we can all agree we're all here
19 because of the orchestration of one person and that person
20 isn't before the Court, and we don't know when he'll ever be
21 before the Court or if he'll be before the Court on any charge
22 or any civil remedy.

23 I think justice will best be served if Mr. Cowen is
24 allowed to cooperate with the Government and is readily
25 available for various civil, criminal actions that will result

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1 in justice being served as to this one person. The investors,
2 the Government all look to that one person stepping up to the
3 plate.

4 I think Mr. Cowen is the key person, the key vehicle
5 upon which justice can be served, and I urge the Court to
6 consider this and understand -- and I'm sure it does -- the
7 impact it will have both on the family and the various cases
8 against the Government if Mr. Cowen is confined.

9 Thank you, Your Honor.

10 THE COURT: Thank you.

11 We'll take a five minute recess.

12 [There was a short recess at 9:47 a.m.]

13 THE COURT: Please be seated.

14 Mr. Ellis, was there any other thing you thought of
15 that you wanted to say before --

16 MR. ELLIS: No, Your Honor. Thank you very much for
17 asking.

18 THE COURT: I have given a great deal of thought to
19 what would be an appropriate sentence under our advisory
20 Guideline scheme, and taking into consideration all of those
21 factors which the defense has very ably briefed in the
22 sentencing memorandum under 18 U.S. Code § 3553, and unlike the
23 sentencing of the codefendant, Mr. Huard, I did not have a
24 sentence in mind before today's sentencing hearing.

25 I certainly had all of the issues that I am aware of

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1 and have carefully considered and, so, let me go back to the
2 way I sort of summarized or paraphrased the defendant's
3 position in the sentencing memorandum, that is, that an
4 appropriate sentence here should be a sentence of probation
5 similar to that which Mr. Huard received, but increasing the
6 special conditions, and I suppose I go back to those
7 distinctions which Mr. Hanusik pointed out and articulated
8 today between Mr. Huard's involvement, Mr. Huard's plea and
9 what it is Mr. Cowen pled guilty to and what his involvement
10 was.

11 Again, Mr. Huard pled guilty to one thing and that was
12 the kickback scheme. Mr. Cowen's plea of guilty was to two
13 things, to manipulation, as well as the undercover kickback
14 scheme, and I suppose that's why, in part, Mr. Huard, when he
15 scored out under the Sentencing Guidelines, scored out to a
16 level 23, a very different starting point from the starting
17 point of Mr. Cowen who started out, technically speaking, at 87
18 months by virtue of the favorable plea terms, he was then
19 capped out at 60 months. But Mr. Cowen scored out to a level
20 29.

21 Mr. Huard had intended victims, but no actual victims.
22 There is a restitution hearing that will take place in this
23 case to address restitution to victims.

24 The Government filed motions for downward departure
25 for both defendants and in Mr. Huard case recommended a

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1 sentence of 26 months, which I departed from by going downward
2 even more in light of special concerns that were raised by
3 Mr. Huard and other factors that I considered in that case.

4 The Government has come forward today and made a
5 request that I reduce Mr. Cowen's sentence down from 60 months
6 to 36, if I'm correct, based on the 40 percent reduction.

7 I have given careful thought and I did read through
8 the sentencing memorandum. I was quite amazed to see color
9 copies of photographs and color copies of exhibits. A great
10 deal of expense has gone into the defendant's presentation here
11 today, but looking beyond the form of the presentation, I
12 looked at the substance, and I am very much aware Mr. Cowen,
13 also similar to Mr. Huard, has family considerations, as do all
14 defendants who come before the Court for sentencing, and that
15 there will be a serious impact felt by his family members
16 resulting from his absence, and that he has very elderly
17 parents on the east coast with serious health concerns and
18 Mr. Cowen's own health issues.

19 Having looked at all of the factors under 3553, ever
20 mindful a sentence should be sufficient but not greater than
21 necessary to reflect the seriousness of the offense, to promote
22 the respect for the law and to provide just punishment for the
23 offense, and keeping in mind the sentence called for under the
24 advisory Guidelines, namely, a sentence of 60 months, I will
25 grant the Government's motion for downward departure.

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1 It is the judgment of the Court that the defendant,
2 Bruce Cowen, be committed to the custody of the Bureau of
3 Prisons to be imprisoned for a term of 24 months as to Count I.
4 That sentence is an even greater departure from that which the
5 Government recommends based upon Mr. Cowen's substantial
6 assistance.

7 I reserve jurisdiction to enter an Order of
8 Restitution. I have already indicated the date of the
9 restitution hearing.

10 I will address the matters pertaining to restitution
11 and the amount of payment following the restitution hearing in
12 August.

13 Upon release from imprisonment, the defendant will be
14 placed on supervised release for a term of three years as to
15 Count I.

16 Within 72 hours of release from the custody of the
17 Bureau of Prisons, the defendant will report in person to the
18 Probation Office in the district to which he is released.

19 While on supervised release, the defendant will not
20 commit any Federal, State or local crimes, he is prohibited
21 from possessing a firearm or other dangerous device and he may
22 not possess any controlled substances.

23 In addition, he will comply with the standard
24 conditions of supervised release that have been adopted by this
25 Court as well as with the following special conditions: The

1 defendant will provide complete access to financial
2 information, which includes the disclosure of all business and
3 personal finances to the probation officer.

4 The defendant shall seek and maintain full-time
5 legitimate employment and not be unemployed for a term of more
6 than 30 days unless excused in writing by his probation
7 officer.

8 The defendant will provide documentation which
9 includes, but is not limited to, pay stubs, contractual
10 agreements, W-2 wage and earning statements and other documents
11 requested by his probation officer.

12 The defendant will not be engaged in any business that
13 offers securities, investments or business opportunities to the
14 public. The defendant is also prohibited from engaging in
15 telemarketing, direct mail or national advertising campaigns
16 for business purposes without the written permission of his
17 probation officer.

18 The defendant will obtain prior written approval from
19 his probation officer before entering into any self-employment.
20 He will not own operate, act as a consultant, be employed in or
21 participate in any manner in any related concern, for example,
22 such as being an officer in any corporation working for any
23 security or commodity corporation, working for any
24 telemarketing company or mass-marketing entity or any business
25 that is involved in stocks or bonds during his period of

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1 supervision without the advance approval of the Probation
2 Office.

3 Upon request of any appropriate regulatory agency, the
4 defendant will relinquish his license to the agency. Such
5 relinquishment will be permanent and will be considered
6 disciplinary action.

7 It is also ordered the defendant pay immediately to
8 the United States a special assessment of \$100.

9 I will allow the defendant to surrender on Friday,
10 August 5th following the conclusion of the restitution hearing.
11 You will surrender here downstairs in the Marshal's office.

12 Now that the sentence has been imposed, does the
13 defendant or his attorney object to the Court's findings or the
14 manner in which sentence was announced?

15 MR. ELLIS: No, Your Honor. But can I address the
16 Court on two issues, if I may?

17 THE COURT: Certainly.

18 MR. ELLIS: Number one, at this point, in light of the
19 fact that the Court has imposed a significant period of
20 incarceration, we would urge the Court to direct Probation to
21 delete paragraph 22 that deals with the telephone calls. It's
22 accurate -- I have no problem with that -- but I would
23 respectfully submit its probative value is outweighed by the
24 prejudicial effect the Bureau of Prisons will use it for, which
25 is assigning Mr. Cowen a public safety factor and putting him

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1 in a low level security facility along with violent inmates.

2 THE COURT: Mr. Hanusik?

3 MR. HANUSIK: Your Honor, I have never been asked to
4 delete something that's factually accurate from a presentence
5 report. It's an odd request to me.

6 I have had numerous white collar cases involving wire
7 fraud and use of the telephones where people have ended up in
8 prison camps. I really can't speak to what the Bureau of
9 Prisons will do. I will leave that to the Court's discretion.
10 It is factually accurate.

11 THE COURT: I am uncomfortable requiring Probation to
12 delete that which is accurate in order to affect a defendant's
13 placement according to the Bureau of Prisons' regulations.

14 I will not do that.

15 MR. ELLIS: The next issue, Your Honor, is regarding
16 the self-surrender. I spoke to Mr. Hanusik about that.

17 Because Mr. Cowen may very well be needed to continue
18 his cooperation, he has indicated he would have no objection to
19 allowing him to self-surrender six months from today, and I
20 would ask the Court to allow him to self-surrender to the
21 institution designated by the Bureau of Prisons for the service
22 of his sentence six months from today.

23 MR. HANUSIK: Your Honor, Mr. Ellis did ask me last
24 night if we would agree to having Mr. Cowen self-surrender at
25 the end of his cooperative activities.

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1 I told Mr. Ellis at that point, really, that ongoing
2 matter is a matter being handled here in Miami by the U.S.
3 Attorney's Office, that I would need to speak to them, but I
4 would not be adverse to a six month extension pending
5 discussion of that.

6 It's really up to the Court.

7 THE COURT: I'm not comfortable with that. That's a
8 very long window of time. In fact, I thought August 5th was a
9 pretty long window of time. It's, basically, giving him two
10 months. In two months there will be a designated facility and
11 the purposes of self-surrender will be accomplished.

12 If the Government needs Mr. Cowen to be out of custody
13 for an extended period of time beyond that, I will entertain a
14 motion filed to that effect, but I won't indicate a
15 self-surrender six months from now.

16 MR. ELLIS: Two final items, Your Honor: Rather than
17 require Mr. Cowen to self-surrender to the U.S. Marshal, I
18 would ask the Court to permit him to self-surrender to the
19 institution designated for the service of his sentence. The
20 reason being this: When you surrender to the U.S. Marshal, you
21 still get a credit as far as self-surrender, but he would
22 self-surrender to the U.S. Marshal in Miami and he would be put
23 to a circuitous travel route before he got to a facility in the
24 west coast. Inmates refer to that as diesel therapy. It can
25 take two, three, even four weeks. It's a horrible experience,

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1 a horrible experience, and if the Court would just delay his
2 self-surrender by two or three days, it would enable him to get
3 back to the west coast and self-surrender there.

4 THE COURT: I will indicate his self-surrender is to
5 be Monday, August the 8th then.

6 MR. ELLIS: Monday, August 8th?

7 THE COURT: Correct.

8 MR. ELLIS: Very good.

9 And, finally, I would ask the Court, is it the Court's
10 policy, upon request, to recommend -- I recognize
11 recommendations are merely recommendations.

12 THE COURT: Yes, I do.

13 MR. ELLIS: I would ask the Court to recommend the
14 Federal prison camp -- maybe lightning will strike here and he
15 won't go to a low -- the Federal prison camp at Sheridan,
16 Oregon, which happens to have the Bureau of Prisons RDAAP,
17 Residential Drug and Alcohol Abuse Program. The alternative,
18 Lompoc, California.

19 THE COURT: We'll include those recommendations.

20 MR. HANUSIK: Your Honor, the only thing left open --
21 and I don't know if this is something you are holding for the
22 restitution hearing conclusion -- I don't think I heard
23 anything about a fine.

24 THE COURT: Given what I anticipate will occur with
25 restitution, the amount, we're looking at \$2 million or so.

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1 MR. HANUSIK: That is the --

2 THE COURT: My greater concern is with payment of
3 restitution, rather than a fine. So, I did not intend to
4 impose one.

5 MR. HANUSIK: Thank you, Your Honor. I just wanted to
6 make sure it wasn't something I missed.

7 MR. AARON: Your Honor, during the recess I became
8 aware of the fact August 4th through 10th I will be in Chicago
9 at the ABA Annual Meeting for the House of Delegates. I would
10 like to be excused from the August 5th meeting.

11 THE COURT: Certainly.

12 You have a good day. I will see you back in August.

13 [There was a short recess after which the following proceedings
14 were had:]

15 MR. HANUSIK: (Not present.)

16 THE COURT: Mr. Ellis.

17 MR. ELLIS: I forgot to ask the Court to recommend the
18 500 hour RDAAP program I recommended earlier at Sheridan. The
19 Government advises it has no objection to the Court making that
20 relation.

21 THE PROBATION OFFICER: The 500 Hour Drug Program.

22 THE COURT: I don't recommend that when somebody is
23 serving a sentence this long. It's two years. I don't think
24 they'll have need for a drug program.

25 MR. ELLIS: Actually, a sentence as little as 18

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1 months would enable -- the program is a 9 month in-patient
2 program and six month out-patient program to be served at a
3 halfway house. So there is enough time with a two-year
4 sentence for this.

5 As the Court is aware, as a result of this, Mr. Cowen
6 has developed an addiction to Xanax, which is a terrible
7 addiction.

8 THE COURT: I won't include a recommendation for that.

9 THE PROBATION OFFICER: Thank you.

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1 C E R T I F I C A T E

2 I hereby certify that the foregoing is an accurate
3 transcription of proceedings in the above-entitled matter.

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